

To: Office of the Supreme Court

From: Judge Bruce R. Cohen, Maricopa County Superior Court

Re: Rule Change Petition R19-0047

On December 13, 2019, Judges Bruce R. Cohen and Gerald Williams submitted a joint petition for rule change relating to ARPOP Rule 35. Thereafter, on May 1, 2020, a comment to the rule change petition was submitted by Judge Wendy Million on behalf of CIDVC. The following is in response to that comment.

Emergency Impacting Child

One concern that has been expressed in the Comment relates to the delay that would occur if a petitioning party were informed that he or she was appearing before the wrong court and was then directed to file before the Superior Court. This concern has merit although, in practice, is not the same kind of issue as would arise if the petition were for an Order of Protection. Please allow me to explain.

Injunctions Against Harassment are governed under Title 12, not Title 13, and unlike an Order of Protection, Injunctions Against Harassment are almost always based upon a series of acts and pattern of conduct. Harassment is defined by the statute as either an act of sexual violence or, “A series of acts over any period of time that is directed at a specific person and that would cause a reasonable person to be seriously alarmed, annoyed or harassed and the conduct in fact seriously alarms, annoys or harasses the person and serves no legitimate purpose.” A.R.S. § 12-1809(S).

With some exceptions, the kinds of acts that would give rise to an Injunction Against Harassment that include children are not the kinds of acts that place a child at imminent risk of injury. When sought for a child, it is most commonly alleged that the new significant other of the other parent is engaged in a pattern of behavior that is detrimental to a child and does not allege or establish that the child is imminent risk.

There are some cases where a parent alleges that their former partner’s new significant other is physically assaulting or is otherwise placing a child in immediate danger. While those cases are understandably problematic, presenting them in the wrong court who will rely upon inapplicable law (Title 12) for issues relating to parents and children (Title 25) is not the solution.

Therefore, while delay in being able to secure relief must always be considered, so too must other issues such as due process and correct application of law. The kinds of cases that cross over from separate civil injunctive relief for harassment into family court thereafter need to be assessed under A.R.S. § 25-403, not under A.R.S. § 12-1809. Whether the case is one where a plaintiff seeks an Injunction Against Harassment for a child to address immediate harm or whether it involves the kind of issues that most commonly generate an Injunction Against Harassment filed on behalf of a child, it must be considered in the context of the underlying

parenting orders that would be assessed under A.R.S. § 25-403. All Superior Courts have processes for addressing emergencies impacting the well-being of children.

Inconvenience

The Comment notes that there is an inconvenience factor associated with a party not knowing that they should be proceeding in the Superior Court and, instead, appearing at a Limited Jurisdiction Court. This likely will occur. However, this should be treated no differently than other circumstances where a party appears at the wrong court. For example, if a party is facing an imminent foreclosure action and appears at a Limited Jurisdiction Court to seek an injunction to prevent it, not only will that party be inconvenienced by being sent elsewhere, that party also runs the risk of arriving too late at the proper court. Yet we would never have a rule that allows for the Limited Jurisdiction Court to act solely because not acting would create an inconvenience or delay.

Identification of Family Cases

Another stated concern is that the Limited Jurisdiction Court may not reasonably know that the case before it may overlap into a family court case. In practice, this should not be a problem. When an Injunction Against Harassment is sought on behalf of a child, the judge should ask how the Defendant in that action has access to the Plaintiff's children. In the cases that this rule is designed to address, the answer will be something along the lines of the Defendant accesses the child through the child's other parent. That would be the triggering comment that would suggest that this issue belongs in Family Court, not a Limited Jurisdiction Court.

Parties to Litigation

The Comment submitted also references identification of the parties to the litigation and jurisdiction over those parties. In fact, this stated concern arises under the current rule structure and would be avoided under this rule change. Presently, a mom could secure an Injunction Against Harassment against dad's significant other that includes the children that are common to mom and dad. If dad lives with the significant other, the Injunction Against Harassment would preclude dad from seeing his children in his own home. Yet he would not be able to contest that order since he was not a party to the Injunction Against Harassment. If this rule change were adopted, this would be reversed and for mom to preclude the children from being in the presence of dad's new significant other, she would have to seek her claims under Title 25 by asserting that dad is placing the children at risk by allowing the new significant other to be in their presence. That is where an issue such as this should be addressed.

One Additional Technical Correction

In the proposed rule change, we referenced children as "protected parties." That reference should more rightfully be "protected persons." This may not be the platform to present this suggestion and if that is true, please accept my apology. Under these unique circumstances, it is a bit more difficult to determine applicable procedures.

Conclusion

There is always a risk of unintended consequences when developing any rule. But here, that risk is extremely limited, if at all. Further, when countered against the misuse of Injunctions Against Harassment involving children as an end-around from a Family Court case, the potential nominal risk is more than accounted for. There is nothing being proposed that would prevent a party from seeking an Injunction Against Harassment for himself or herself against another adult party. But when a parent is acting on behalf of a child, those actions almost always raise and address Title 25 concerns, not concerns under Title 12.

With great respect and deference to the comments provided by CIDVC, a committee to which I am a proud member, I continue to support the rule change, as submitted.